UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DEAN EMMONS,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 93-267-P-C***
	)	
DONNA E. SHALALA,	***)***	
Secretary of Health	***)***	
and Human Services,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability appeal raises the single issue of whether the Secretary erred in her determination that the plaintiff was not under a disability as of March 9, 1993, in light of the Appeals Council's refusal to review the case to consider evidence of a physician's examination of the plaintiff subsequent to that date. Because I conclude that the Appeals Council did not commit error, I recommend that the court affirm the Secretary's determination.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity

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[1] This action is properly brought under 42 U.S.C. § 405(g). The Secretary has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 26, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on February 28, 1995 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, cause authority and page references to the administrative record.

since April 13, 1990, Finding 2, Record p. 19; that he has severe back pain associated with disc bulging and degenerative disc disease, but that he does not have an impairment or combination of impairments that meets or equals any listed in Appendix 1 to Subpart B, 20 C.F.R. § 404 (the "Listings"), Finding 3, Record p. 19; that he is unable to perform his past relevant work as a buffer, wood cutter, truck driver, auto salvage worker and recycling worker, Finding 6, Record p. 19; that his residual functional capacity for the full range of sedentary work is reduced by his inability to sit for prolonged periods, Finding 7, Record p. 19; that there is nevertheless a significant number of jobs in the national economy that he is able to perform, Finding 12, Record p. 20; and that he is therefore not disabled, Finding 13, Record p. 20. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final determination of the Secretary, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F. 2d 622, 623 (1st Cir. 1989). The Appeals Council made its determination despite the submission by the plaintiff of a letter from Frank A. Graf, M.D., who examined the plaintiff after the date of the administrative law judge's determination. Graf found evidence of disc bulging and degenerative disc disease, also diagnosed carpal tunnel syndrome and concluded that the plaintiff "has substantial musculoskeletal and peripheral nerve impairments such that he is disabled for employment." *See* Appendix A to Motion to Amend Record to Include Medical Report of May 5, 1993 (the "Graf Report") (Docket No. 3) at 2-3.

The plaintiff contends that the Appeals Council abused its discretion in refusing to consider the Graf Report. The Secretary's regulations provide that, in reviewing a determination of an administrative law judge, the Appeals Council must consider new and material evidence submitted by a claimant, but

> only where [the evidence] relates to the period on or before the date of the administrative law judge hearing decision. The Appeals Council shall evaluate the

> entire record including the new and material evidence submitted if it relates to the period on or before the date of the administrative law judge hearing decision. It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record.

20 C.F.R. § 404.970(b). This regulation does not vest any discretion in the Appeals Council as to when it may consider new and material evidence; the Appeals Council commits an error of law if it refuses to consider the evidence that meets the standard set forth in section 404.970(b). *See Keeton v. Department of Health & Human Servs.*, 21 F.3d 1064, 1066 (11th Cir. 1994); *Nelson v. Bowen*, 855 F.2d 503, 506 (7th Cir. 1988) (noting that the court's review of the Appeals Council's determination is *de novo*).

Pursuant to section 404.970(b), the Appeals Council explicitly concluded that the Graf Report does not relate to the period on or before March 9, 1993, the date of the administrative law judge's determination. *See* Record p. 4. I find no error of law by the Appeals Council. The plaintiff concedes that Graf's findings were made after the date of the initial hearing decision, but notes that the Graf Report makes reference to August 1, 1989 as the date of injury, that Graf diagnosed chronic pain that is "by definition long standing," that Graf based his report in part on x-rays that were taken prior to the initial hearing decision, and that the degenerative disc disease diagnosed by Graf is a process that "occurs over a relatively long time." Obviously, the kinds of illnesses at issue in a Social Security Disability proceeding are long-term ones, and section 404.970 provides a claimant with a significant opportunity to supplement the record at an intermediate stage in the administrative proceedings before the Secretary. But section 404.970 was plainly intended to limit this opportunity and screen out the very kind of bootstrapping the plaintiff attempts here.

The x-rays reviewed by Graf were apparently more than two years old when he reviewed them. The plaintiff therefore contends that Graf's diagnosis of a "degenerative" disc disease, *see*

Graf Report at 2, both relates back to the relevant period and bolsters the contention that a medical assessment performed in May 1993 is retroactively relevant because it pinpointed a longstanding medical problem. Noting that the administrative law judge found that his assertions concerning pain were "not entirely credible" in light of "rather minimal objective findings established on [medical] examination," *see* Record at 17, the plaintiff contends that the Graf Report would have been relevant to the evaluation of his pain level in light of its references to chronic back dysfunction. All of this is an attempt to spin gold out of straw; Graf's ultimate finding that the plaintiff suffers from "substantial musculoskeletal and peripheral nerve impairments such that he is disabled for employment" is not a function of his review of the old x-rays but stems from a physical examination and review of other test results that do not relate to the relevant period. The reference in the Graf Report to a date of injury is purely historical and does not make the doctor's examination retroactive to the referenced date. The court may remand this case to the Secretary for the taking of additional evidence "only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." 42 U.S.C. § 405(g). The evidence at issue here simply is not material, and a remand for consideration of the Graf Report would therefore run counter to section 405.

Accordingly, I reject the contention of the plaintiff that in light of the Graf Report the decision of the Secretary is not supported by substantial evidence in the record, as required by section 405(g). *Cf. O'Dell v. Shalala*, 1994 U.S. App. LEXIS 36540 at *6 to *9 (10th Cir. 1994) (physician's letter submitted as new evidence antedated close of hearing record); *Keeton*, 21 F.3d at 1067-68 (Appeals Council erred in refusing to consider additional evidence from plaintiff's longtime

treating physician because it concluded evidence was cumulative).[2] Even if the Graf Report consisted of material evidence, the plaintiff's reliance on its conclusion that he is "disabled for employment" would be unavailing. The determination of the ultimate question of disability is for the Secretary, not physicians. *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

As to the record that was actually before the administrative law judge, the plaintiff offers nothing beyond the bare allegation of insufficient evidence. The administrative law judge concluded that the plaintiff's ability to perform the full range of sedentary work is reduced by his inability to sit for prolonged periods. Accordingly, in expressing an opinion as to whether the plaintiff is able to perform jobs that exist in the national economy in significant numbers, the vocational expert was asked to assume that the plaintiff could not sit for longer than one-half hour at a time. This is consistent with the medical evidence in the hearing record.

The Secretary's determination is supported by substantial evidence in the record, and the Appeals Council did not err in refusing to consider the evidence of a medical examination that took place subsequent to the hearing conducted by the administrative law judge and that included no evidence relevant to the plaintiff's disability as of March 9, 1993. Accordingly, I recommend that the Secretary's decision be **AFFIRMED**.

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[2] As noted in *O'Dell* and *Keeton,* there is a split in the circuits over whether the reviewing court in such circumstances should review for substantial evidence the record that was before the administrative law judge or the record as supplemented by the additional evidence submitted to the Appeals Council. *See O'Dell*, 1994 U.S. App. LEXIS 36540 at *6 to *9; *Keeton*, 21 F.3d at 1066-67. Although the First Circuit has never ruled on the question, it is not presented here because the Graf Report lacks the required materiality.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 7th day of March, 1995.

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David M. Cohen
United States Magistrate Judge